2011 IL App (1st) 101121-U

SECOND DIVISION
DECEMBER 27, 2011

No. 1-10-1121

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 10409
	)	
DAVID ELDEFONSO,	)	Honorable
	)	Carol Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶1 *Held*: The plain error doctrine does not apply to reach the forfeited issue that the trial court violated Illinois Supreme Court Rule 431(b) during jury selection; the defendant's claim that the trial court improperly denied his motion to strike a member of the venire for cause is not subject to review on appeal; and the trial court properly imposed a 3-year mandatory supervised release term against the defendant.

¶2 Following a jury trial in the circuit court of Cook County, defendant David Eldefonso was convicted of both charges of delivery of a controlled substance within 1000 feet of a public park and delivery of a controlled substance. Subsequently, he was sentenced to 8 years of imprisonment with a mandatory supervised release (MSR) term of 3 years. On appeal, the defendant argues that: (1) the

trial court violated Illinois Supreme Court Rule 431(b) during *voir dire*; (2) he was deprived of his right to a fair and impartial jury when the trial court improperly denied his motion to strike a member of the venire for cause; and (3) the trial court erroneously imposed a 3-year MSR term, rather than a 2-year MSR term, in sentencing the defendant. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶3 BACKGROUND

¶4 On May 19, 2009, Chicago police officers conducted an undercover narcotics surveillance and controlled transaction on the 3800 block of West Diversey Avenue in Chicago, Illinois, during which the defendant sold crack cocaine to undercover police officers.

¶5 On June 10, 2009, the defendant was charged with delivery of a controlled substance within 1000 feet of a public park (720 ILCS 570/407(b)(2) (West 2008)) and delivery of a controlled substance (720 ILCS 570/401(d) (West 2008)).[1]

¶6 On January 26, 2010, jury selection was held during which the trial court addressed the entire venire with the following pertinent language:

> "[I]f the answer to any of these questions is "yes" I want you to raise your hand. [The defendant] is presumed to be innocent until the jury determines after deliberations that he is guilty beyond a reasonable doubt. Does anyone disagree with this rule of law? Let

[1]The offense of "delivery of a controlled substance" was a lesser-included offense that later merged with the offense of "delivery of a controlled substance within 1000 feet of a public park."

the record reflect no one has raised their hand.

State has the burden of proving [the defendant] guilty beyond a reasonable doubt. Does anybody have any disagreement with this rule of law[?] [L]et the record reflect no one has raised their hand.

The [d]efendant does not have to present any evidence at all and may rely on the presumption of innocence[.] [D]oes anybody disagree with this rule of law? Let the record reflect that no one has raised their hand.

[The defendant] does not have to testify; would any of you hold the fact that [the defendant] did not testify at trial against him?"

At that time, one prospective juror, Yulonda Thomas (Thomas), raised her hand and indicated that she might have a problem with the defendant if he did not testify. The trial court then acknowledged Thomas' statement, and asked whether anyone else believed that the defendant's decision not to testify should be "held against him." The record shows that no one else objected to this principle.

¶7 Subsequently, the trial court engaged in the following exchange with a prospective juror, Adrienne Gedvilas (Gedvilas), during the individual questioning portion of *voir dire*:

"[THE COURT]: [Y]ou have been a victim of a crime?

[MS. GEDVILAS] [prospective juror]: Yes.

[THE COURT]: Can you tell us about that?

[MS. GEDVILAS]: It was about eight or nine years ago, my purse was stolen.

* * *

[THE COURT]: Is there anything about that experience that would make it difficult for you to serve on this jury?

[MS. GEDVILAS]: No.

[THE COURT]: Someone in your immediate family has been accused of a crime or victim of a crime?

[MS. GEDVILAS]: Yes.

[THE COURT]: Could you tell us about that?

[MS. GEDVILAS]: My brother a few years ago witnessed his co-worker getting murdered.

[THE COURT]: I'm sure that was a traumatic experience for your brother. Is there [*sic*] about that experience that would make it difficult for you to serve on this jury and give both sides a fair trial?

[MS. GEDVILAS]: I'm not sure."

Thereafter, outside the presence of the jury, the State made a for-cause challenge to strike Gedvilas from the venire panel, stating that Gedvilas had "indicated again whether or not she could be fair." The trial court then asked what exactly Gedvilas had said, to which defense counsel[2] responded that "[Gedvilas]'s brother witnessed the co-worker getting murdered so she didn't know if that would

[2]The defendant was represented by one female and one male attorney. During *voir dire*, the female defense counsel engaged in the exchange at issue with the trial court. Thus, for clarity and consistency, we only refer to defense counsel with the pronoun "she."

affect her ability to be fair." The trial court then noted that it believed that "[Gedvilas] said she could give both sides a fair trial, so the challenge for cause on Gedvilas will be denied." The trial court then specifically asked defense counsel whether she wanted to make any for-cause challenges. Defense counsel again stated that "[w]e did hear [Gedvilas] say that she wasn't sure if she could be fair, but I don't know if it was—" and the trial court interrupted by stating that "[t]he challenge for cause is denied." Defense counsel then exercised a peremptory challenge against another venire member, Dean Cantave (Cantave), but affirmatively accepted Gedvilas as a jury member.

¶8 On January 27, 2010, a jury trial began during which the State presented the testimony of four Chicago police officers. Officer Gonzalez testified that on May 19, 2009, police officers received information from a concerned citizen regarding narcotics activity on the 3800 block of West Diversey Avenue in Chicago. Based on that information, he formulated a plan to conduct an undercover narcotics purchase in the area of West Diversey and Springfield Avenues, near Kosciuszko Park (the park). Officer Gonzalez stated that at approximately 4p.m. on that day, he, acting as an undercover "buy officer," approached the park area on foot while dressed in civilian clothing. Once he arrived at the targeted location near the park, Officer Gonzalez observed, from a distance of 20 to 25 feet away, an individual on a sidewalk yelling, " 'my boy [*sic*] got rocks,' " which is a street term for crack cocaine. Officer Gonzalez described this individual, who was later identified as Edward Chavarra (Chavarra), as a Hispanic male wearing a white t-shirt and sporting facial hair, a goatee, and long hair. As Officer Gonzalez looked in Chavarra's direction, Chavarra returned Officer Gonzalez' gaze, reiterated that "my boy [*sic*] got rocks," and pointed at the driver's side of a nearby green Ford Explorer (the green car). Officer Gonzalez then walked towards the

green car, at which time an individual in the driver's seat of the green car "waved [Officer Gonzalez] towards him." At this point in the trial, Officer Gonzalez made an in-court identification of the defendant as the individual he had observed sitting in the driver's seat of the green car. However, Officer Gonzalez noted that the defendant's physical appearance was different at trial than on May 19, 2009, explaining that at the time of the narcotics purchase, the defendant wore a red t-shirt, had neck and facial tattoos and a shaven head, but did not have glasses, a sling on his arm or a wheelchair.

¶9 Officer Gonzalez then testified that he approached the window of the driver's side of the green car, that he had an unobstructed view of the defendant's face, but that he did not see any other individuals in the vehicle. The defendant then stated, "I have rocks, what [*sic*] you need," and signaled for Officer Gonzalez to come around to the passenger side of the green car. Officer Gonzalez complied, leaned into the open passenger-side window, and asked the defendant whether he could purchase $30 worth of crack cocaine. The defendant then stated, "I got you," and Officer Gonzalez gave the defendant $30 of pre-recorded "1505 funds" which he had received from Officer Sergio Corona (Officer Corona) earlier. In exchange, the defendant handed Officer Gonzalez a clear plastic bag containing suspect crack cocaine. Following the undercover narcotics purchase, Officer Gonzalez walked westbound on West Diversey Avenue to a gangway near Springfield Avenue, where he met up with Officer Corona and gave him a description of the suspects and the green car. Following the defendant's arrest at 4300 West Diversey Avenue, Officer Gonzalez observed the defendant standing on the sidewalk with crutches. Officer Gonzalez then testified that a photograph of the defendant taken on the day of his arrest looked "exactly" how the defendant appeared to

Officer Gonzalez at the time of the undercover narcotics transaction. On cross-examination, Officer Gonzalez testified that the police report contained a clerical error because it stated that the defendant was the individual who had yelled "my boy [*sic*] got rocks" and pointed Officer Gonzalez to the green car.[3]

¶10 Officer Corona testified that on May 19, 2009, he participated in the undercover narcotics surveillance on the 3800 block of West Diversey Avenue in Chicago. On that day, May 19, 2009, Officer Corona obtained $30 in police "1505 funds" in preparation of the undercover narcotics transaction. Officer Corona testified that while he did not fill out a "1505 fund sheet" documenting the specific bills he had obtained, he made a photocopy of the bills to document the serial numbers. Officer Corona then gave the $30 of "1505 funds" to Officer Gonzalez. On May 19, 2009, at approximately 4p.m., Officer Corona, acting as a security surveillance police officer to ensure Officer Gonzalez' safety during the narcotics transaction, observed an individual near the park yelling "my boy [*sic*] got rocks." Officer Corona, dressed in civilian clothing, observed Officer Gonzalez approach this individual. Officer Corona also noticed a Hispanic male, who was sitting in the driver's seat of the green car and wearing a red shirt, grab the attention of Officer Gonzalez. At this point at trial, Officer Corona made an in-court identification of the defendant as the individual who was sitting in the green car. However, Officer Corona noted that the defendant's in-court physical appearance was different from what he looked like on the day of the undercover narcotics transaction

[3]We note that the police arrest report contained in the record on appeal accurately states that the defendant was "the subject that delivered *** crack cocaine to [Officer] Gonzalez." It is unclear to this court what other police report containing a clerical error was presented at trial.

because the defendant "had tattoos on his neck, *** had a tattoo underneath his eye, *** was bald, *** didn't have glasses, and [there was nothing] wrong with his arm." Officer Corona then testified to the details of the undercover narcotics transaction, which mainly paralleled Officer Gonzalez' testimony. Officer Corona did not see anyone else in the green car during the undercover narcotics transaction. Officer Corona stated that, following the undercover narcotics transaction, he radioed "enforcement officer" Officer Ryan Delaney (Officer Delaney) with a description of the suspects and the green car. Following the defendant's arrest at 4300 West Diversey Avenue, Officer Corona recovered from the defendant's pockets the $30 of "1505 funds" which Officer Gonzalez had used in the undercover narcotics transaction.

¶11 Officer Delaney testified that on May 19, 2009, he participated in the undercover narcotics surveillance as a "surveillance officer in a covert vehicle" on the 3800 block of West Diversey Avenue in Chicago. As a "surveillance officer," it was Officer Delaney's duty to "keep an eye on the subject in the vehicle in question." After Officer Corona radioed Officer Delaney with the descriptions of the offender and the green car, Officer Delaney, who was wearing civilian clothing and situated two blocks away, drove his unmarked police vehicle and parked directly behind the green car on West Diversey Avenue. Officer Delaney observed two individuals in the green car while it was parked on West Diversey Avenue. Shortly thereafter, Officer Delaney followed the green car as it traveled westbound on West Diversey Avenue for a few blocks, after which "enforcement officers" stopped the green car. He stated that no one entered or exited the green car during the time he followed it. Subsequently, Officer Delaney parked his unmarked police vehicle at a nearby location, and proceeded on foot to the arrest location. At the arrest location, Officer

Delaney observed the defendant, who was the driver of the green car, standing with crutches on the sidewalk as he was being detained by police officers. Officer Delaney testified that at no time did he see the defendant switch seats with the passenger in the green car, nor did he see any females present.

¶12 Officer Roberto Rodriguez (Officer Rodriguez) testified that on May 19, 2009, at approximately 4p.m., he and his partner Officer Gary Frear (Officer Frear), acting as "enforcement officers," stopped the green car driven by the defendant based on information provided by Officer Delaney over the police radio. Officer Rodriguez stated that he and Officer Frear first removed Chavarra from the passenger side of the green car because the driver's side door would not open. They then removed the defendant from the green car, and detained him "outside of the vehicle" for several minutes until other police officers arrived. Officer Rodriguez stated that during the arrest, the defendant was wearing a red t-shirt and shorts, and that no other individuals were found in the green car.

¶13 Christina Storm (Storm) testified on behalf of the defense that on May 19, 2009, at approximately 4p.m., she was leaving a restaurant located on West Diversey and Kostner Avenues when she observed two or three unmarked police vehicles stop a green "SUV." She stated that the police officers screamed at an individual in the green car to "get down," and that the individual responded by yelling that he was handicapped. Storm then made an in-court identification of the defendant as the individual she saw being removed from the passenger side of the green car. However, Storm noted that she did not see the defendant with any crutches. Storm further testified that she saw the police officers next remove "another guy and a girl" from the passenger side of the

green car, and that Storm later gave the girl a ride home because the girl was pregnant. Storm stated that she did not see the police officers remove anyone from the driver's side of the green car. Storm testified that she did not know the three individuals in the green car prior to May 19, 2009, but later learned that the girl was named "Angie."

¶14 The defendant also introduced into evidence a certified document showing that Chavarra was the owner of the green car. The parties then stipulated that Forensic Chemist Katherine Frost (Frost), if called to testify, would testify to a reasonable degree of scientific certainty that the clear plastic bag given to Officer Gonzalez contained 0.4 grams of cocaine. Subsequently, the trial court denied the defendant's motion for a directed verdict.

¶15 Following deliberations, the jury found the defendant guilty on both charges of delivery of a controlled substance within 1000 feet of a public park and delivery of a controlled substance.

¶16 On February 1, 2010, the defendant filed a motion for a new trial, which the trial court denied. On April 5, 2010, the trial court sentenced the defendant to 8 years of imprisonment with a MSR term of 3 years, finding that the lesser-included offense of "delivery of a controlled substance" merged with the offense of "delivery of a controlled substance within 1000 feet of a public park." Subsequently, the trial court denied the defendant's motion to reconsider the sentence.

¶17 On April 7, 2010, the defendant filed a timely notice of appeal before this court.

¶18 ANALYSIS

¶19 We determine the following issues: (1) whether the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire*; (2) whether the trial court improperly denied his motion to strike a member of the venire for cause; and (3) whether the trial court erroneously

imposed a 3-year MSR term, rather than a 2-year MSR term, in sentencing the defendant.

¶20 We first determine whether the trial court violated Illinois Supreme Court Rule 431(b) during *voir dire*.

¶21 The defendant asserts that the trial court failed to properly admonish potential jurors pursuant to Rule 431(b), when it asked the members of the venire whether they "disagreed" with the principles listed therein, or whether the defendant's decision not to testify would be "held against him." The defendant concedes that he failed to properly preserve this issue for review.

¶22 The State argues that the trial court properly informed the potential jurors of the principles of Rule 431(b), and that it clearly offered them an opportunity to respond regarding their understanding and acceptance of the principles. The State contends that even if an error occurred, it does not rise to the level of plain error because the evidence in this case was not closely balanced.

¶23 We agree that the defendant has forfeited this issue for review on appeal because defense counsel neither objected during *voir dire* nor presented it in the defendant's motion for a new trial. *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472-73 (2005) (a defendant who fails to either make a timely trial objection and include the issue in a posttrial motion forfeits the review of the issue). However, the plain error doctrine allows a reviewing court to consider unpreserved issues when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is so serious, regardless of the closeness of the evidence. *Id.* at 178-79, 830 N.E.2d at 475; *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). In order to obtain reversal and a new trial, the defendant bears the burden of persuasion. See *People v. Hayes*, 409 Ill. App. 3d 612, 628, 949 N.E.2d 182, 195 (2011). The first step in a plain error analysis is to determine whether an

error occurred at all. *People v. McLaurin*, 235 Ill. 2d 478, 489, 922 N.E.2d 344, 351-52 (2009); *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964, 971 (2008).

¶24 Rule 431(b) is a codification of our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984), and states as follows:

> "[t]he court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted a State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶25 A review of the record shows that the trial court explained each of the first three *Zehr* principles to the entire venire, and, after each explanation, the trial court asked whether any juror "disagreed" or had a "disagreement" with each principle of law. The trial court then stated the fourth principle–that the defendant did not have to testify–and asked the venire whether they would "hold

the fact that [the defendant] did not testify at trial against him?" Only one prospective juror, Thomas, indicated that she might have a problem with the defendant if he elected not to testify.

¶26 In *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010), our supreme court held that the trial court failed to comply with Rule 431(b) because it admonished members of the venire regarding only three of the four *Zehr* principles, asked the prospective jurors whether they "understood" two of the principles, but failed to ask if they "accepted" all four principles. The *Thompson* court stated that Rule 431(b) required "questioning on whether the potential jurors both understand and accept each of the enumerated principles." *Id.* at 607, 939 N.E.2d at 410. Nevertheless, the *Thompson* court found that this error did not warrant an automatic reversal of the defendant's conviction, nor did it rise to the level of plain error because the defendant had not presented any evidence that the trial court's violation of Rule 431(b) resulted in a biased jury. *Id.* at 611, 614-15, 939 N.E.2d at 412-14 (plain error analysis restricted to only the second prong of the plain error doctrine where the defendant did not argue that the evidence was closely balanced).

¶27 In the instant case, the defendant does not dispute that the trial court addressed each of the four principles with the venire. Rather, he takes issue with the phraseology used by the trial court, by noting that the trial court did not use the terms "understand" and "accept," but instead, asked prospective jurors whether they "disagreed" or had a "disagreement" with the first three principles and whether his decision not to testify would be "held against him." Reviewing courts have held that "Rule 431(b) does not dictate a particular methodology for establishing the venire's understanding and acceptance of those principles," and have found that the rule does not provide "magic language" or "catechism" to ensure the trial court's compliance. *People v. Digby*, 405 Ill. App. 3d 544, 548,

939 N.E.2d 581, 585 (2010) (finding no Rule 431(b) violation where the trial court inquired whether the potential jurors "had a problem" or "disagreed" with the stated principles); see *People v. McCovins*, 2011 IL App (1st) 081805B (finding no error in the trial court's phraseology in asking if any prospective juror "cannot abide by" or "disputed" the principles); *People v. Ware*, 407 Ill. App. 3d 315, 355-56, 943 N.E.2d 1194, 1228 (2011) (finding no Rule 431(b) violation where the trial court asked the venire whether "anybody had any difficulty" with each of the principles because the language used "encompasse[d] both understanding and acceptance").

¶28 However, this court's recent decision in *People v. Fountain*, 408 Ill. App. 3d 33, 944 N.E.2d 866 (2011), is instructive, where the facts of that case are highly analogous to the facts of the instant case. In *Fountain*, as in this case, the trial court explained each of the first three *Zehr* principles to the jury venire and, after each explanation, asked whether any prospective juror had "a problem with" or "disagreed with" each principle of law. *Id.* at 42, 944 N.E.2d at 874. The trial court then explained the fourth principle of law, similar to the facts in the case at bar, by stating that the defendant did not have to testify at trial, and asking the members of the venire if they would "hold the fact that a [d]efendant may not testify at trial against that [d]efendant?" *Id.* On appeal, the *Fountain* court noted that modification of the language in Rule 431(b) was discouraged, and held that the trial court's failure to ask prospective jurors "to respond to separate questions [of] whether he or she 'understands' and 'accepts' each of the four principles" was "likely error, though not reversible error." *Id.* at 43, 944 N.E.2d at 875.

¶29 Likewise, based on the holding in *Fountain*, we conclude that the trial court in the instant case did not sufficiently comply with Rule 431(b). Furthermore, we note that the language used by

the trial court did not necessarily encompass both "understanding and acceptance" because a prospective juror may agree or "disagree" with a particular principle of law without fully understanding it. But *cf. Ware*, 407 Ill. App. 3d at 356, 943 N.E.2d at 1228 (inquiry to prospective jurors regarding whether "anybody had any difficulty" with each of the principles "encompasse[d] both understanding and acceptance" because "an individual who did not understand the principle or did not accept the principle would 'have difficulty' with the principle"). Thus, while the court's language may have satisfied the "acceptance" requirement of Rule 431(b), we cannot conclude that these terms satisfied the "understanding" requirement of the rule. Accordingly, we find that the trial court committed error.

¶30 Having found that an error occurred, we examine whether the error rises to the level of plain error. Because the defendant only argues plain error under the closely-balanced-evidence prong of the plain error doctrine, we limit our analysis to the first prong of the plain error test. As discussed, a reviewing court may consider unpreserved issues under the closely-balanced-evidence prong of the plain error doctrine if "the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence." *Herron*, 215 Ill. 2d at 178, 830 N.E.2d at 475.

¶31 The defendant, relying on *People v. Naylor*, 229 Ill. 2d 584, 893 N.E.2d 653 (2008), contends that the evidence in this case was closely balanced because the question of his guilt was based entirely upon the jury's credibility determinations. He specifically argues that Storm's testimony contradicted the testimony of Officers Gonzalez and Corona because she stated that police officers first removed the defendant from the passenger side of the green car, which suggests that the defendant was not the driver, and thus, not the person who sold crack cocaine to Officer Gonzalez.

Further, he posits that Storm's testimony regarding the order of egress of the individuals in the green car tended to contradict the police officers' testimony that the police report contained a clerical error because it stated that the defendant was the individual who had stood outside of the green car and had yelled "my boy [*sic*] got rocks." The defendant further argues that the probative value of the photocopy of the $30 bills used by the undercover police officer to purchase narcotics was directly tied to Officer Corona's credibility. We disagree with the defendant's contentions and conclude that the evidence was not closely balanced.

¶32 In *Naylor*, our supreme court found that the evidence at trial was closely balanced because the defendant's conviction for possession and delivery of narcotics depended solely upon two different testimony regarding the identity of the narcotics seller, and "no additional evidence was introduced to contradict or corroborate either version of events." *Id.* at 607-08, 893 N.E.2d at 667-69. The *Naylor* court held that, "[g]iven these opposing versions of events, and the fact that no extrinsic evidence was presented to corroborate or contradict either version, the trial court's finding of guilty necessarily involved the court's assessment of the credibility of the two [police] officers against that of the defendant." *Id.* at 607, 893 N.E.2d at 668.

¶33 We find the defendant's reliance on *Naylor* to be misplaced. Here, unlike *Naylor*, the defendant's conviction was not solely dependent upon the credibility determination of two competing versions of witness testimony regarding the identity of the narcotics seller. Rather, Storm was not an eyewitness to the undercover narcotics transaction and her testimony at trial centered around the events she had allegedly observed *after* the narcotics purchase had taken place. At trial, the jury heard undisputed testimony from Officers Gonzalez and Corona that the defendant was the

individual who had sold crack cocaine to Officer Gonzalez in an undercover narcotics transaction. The jury was presented with testimony of Officer Gonzalez' description of the defendant's physical appearance at the time of the undercover narcotics transaction, which was corroborated by Officer Corona's testimony. The jury was also presented with testimony that Chavarra's physical appearance significantly differed from that of the defendant. Further, Officer Gonzalez' explanation that the police report contained a clerical error was unrebutted at trial. In the case at bar, unlike *Naylor* where no extrinsic evidence existed at trial, the State presented a photocopy of the $30 of "1505 funds" recovered from the defendant's pockets at the time of his arrest. Based on the foregoing, we cannot conclude that the evidence in this case was so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence. Accordingly, the plain error doctrine does not apply to reach the forfeited issue.

¶34 We next determine whether the trial court improperly denied his motion to strike a member of the venire for cause.

¶35 The defendant asserts that the trial court erred in denying defense counsel's request to excuse Gedvilas for cause, after she explicitly stated during *voir dire* that she was "not sure" of her ability to be fair in light of an incident in which her brother witnessed the murder of a co-worker. The defendant concedes that he failed to properly preserve this issue for review on appeal, but asserts that this court should review the issue under the plain error doctrine.

¶36 The State counters that the defendant has forfeited review of this issue on appeal, and that the plain error doctrine does not apply to reach this issue because no error occurred. Even if an error occurred, the State contends, such error was "invited" by defense counsel's decision not to use a

peremptory challenge against Gedvilas. It further argues that the defendant cannot satisfy the two prongs of the plain error doctrine.

¶37 We find this court's reasoning and holding in *People v. Bowens*, 407 Ill. App. 3d 1094, 943 N.E.2d 1249 (2011), to be particularly instructive, and conclude that the defendant cannot maintain his claim that the trial court erred in denying defense counsel's request to excuse Gedvilas for cause because he has affirmatively waived this contention. Waiver is the voluntary relinquishment of a known right, whereas forfeiture is the failure to make a timely assertion of a known right. *People v. Phipps*, 238 Ill. 2d 54, 62, 933 N.E.2d 1186, 1191 (2010). In the course of representing their clients, "trial attorneys may (1) make a tactical decision not to object to otherwise objectionable matters, which thereby *waives* appeal of such matters, or (2) fail to recognize the objectionable nature of the matter at issue, which results in procedural *forfeiture*." (Emphases added.) *Bowens*, 407 Ill. App. 3d at 1098, 943 N.E.2d at 1256.

¶38 During jury selection, prospective jurors may be challenged either for cause or peremptorily. *Id.* A challenge for cause is a challenge to disqualify a potential juror, based on a specified reason such as bias or prejudice. *Id.*, citing Black's Law Dictionary 245 (8th ed. 2004). On the other hand, a peremptory challenge is "one of a party's limited number of challenges that do not need to be supported by a reason." *Id.* Challenges for cause are limitless and left to the trial court's discretion, while peremptory challenges are limited by Illinois Supreme Court Rule 434(d), "which allows defendants in a criminal case facing imprisonment seven such challenges." *Id.*; Ill. S. Ct. R. 434(d) (eff. May 1, 1985). This court has repeatedly held that a trial court's ruling on a challenge for cause will be reviewed "only when an objectionable juror was forced upon a party *after* it had exhausted

its peremptory challenges." (Emphasis in original.) *Id.* at 1099-1100, 943 N.E.2d at 1257; *People v. Dixon*, 382 Ill. App. 3d 233, 240, 887 N.E.2d 577, 584 (2008) ("the failure to exhaust peremptory challenges waives any claim that an objectionable venireperson was allowed to sit on the jury"); *People v. Redmond*, 357 Ill. App. 3d 256, 258, 828 N.E.2d 1206, 1209 (2005) (same); *People v. Pendleton*, 279 Ill. App. 3d 669, 675, 665 N.E.2d 350, 355 (1996) ("the settled principle in Illinois is that a court's failure to remove a juror for cause is grounds for reversal only if the defense has exercised all of its peremptory challenges and an objectionable juror was allowed to sit on the jury").

¶39 In *Bowens*, the trial court denied the defendant's for-cause challenge against a potential juror (Juror 7). *Bowens*, 407 Ill. App. 3d at 1099, 943 N.E.2d at 1256-57. At the time the trial court denied the defendant's for-cause challenge, the defendant had three remaining peremptory challenges, which he did not use to strike Juror 7. *Id.* at 1099-1100, 943 N.E.2d at 1257. Instead, the defendant used one of the peremptory challenges against another prospective juror in the venire and accepted the venire panel, which included Juror 7. *Id.* On appeal, the reviewing court held that the defendant had waived review of his contention that the trial court erred in denying his for-cause challenge of Juror 7, finding that the defendant's failure to make a peremptory challenge against Juror 7 and his acceptance of the venire panel, which included Juror 7, amounted to an "affirmative acquiescence" to Juror 7's jury service. *Id.* at 1100, 943 N.E.2d at 1258.

¶40 In the case at bar, following *voir dire* questioning by the trial court, the State made a for-cause challenge against Gedvilas, who was included in the first venire panel. The trial court denied the State's request to excuse Gedvilas. Immediately thereafter, defense counsel made a for-cause challenge against Gedvilas, which the trial court again denied. At the time that the trial court denied

defense counsel's for-cause challenge against Gedvilas, the defense had only exercised three of its seven peremptory challenges. Rather than exercising one of the remaining peremptory challenges against Gedvilas, the record clearly reveals that defense counsel instead used a fourth peremptory challenge against another venire member, Cantave. Defense counsel then affirmatively accepted Gedvilas as a jury member.

¶41 If the defendant had believed that a fair trial required Gedvilas to be excused from the jury, defense counsel could and should have removed her from the first venire panel with one of the remaining four peremptory challenges. See *id.* After all, the record clearly shows that defense counsel understood both the availability of the defendant's peremptory challenges and how to use them. See *id.* Thus, the circumstances which confront us here compel the conclusion that defense counsel's actions were an affirmative acquiescence to Gedvilas' jury service, which constituted a waiver of this issue on appeal.

¶42 Moreover, we note that had defense counsel used a peremptory challenge against Gedvilas and later exhausted all of the defendant's peremptory challenges, she could have requested, if necessary, additional peremptory challenges–a request that the trial court could have granted at its discretion. See *id.* at 1100, 943 N.E.2d at 1257; *People v. Fort*, 248 Ill. App. 3d 301, 311, 618 N.E.2d 445, 453 (1993) ("a request for additional peremptory challenges rests within the sound discretion of the trial court").

¶43 Despite the defendant's contention on appeal, the plain error analysis does not apply to the facts of this case. "Plain-error analysis applies to cases involving procedural default, *** not affirmative acquiescence." *Id.* at 1101, 943 N.E.2d at 1258; see *People v. Durr*, 215 Ill. 2d 283, 308,

830 N.E.2d 527, 541 (2005); *People v. Townsell*, 209 Ill. 2d 543, 547-48, 809 N.E.2d 103, 105 (2004) (holding that the appellate court erred in analyzing the defendant's claim under the plain error analysis, where the defendant had voluntarily relinquished a known right, and, thus, waived review of the issue on appeal). Thus, where defense counsel affirmatively acquiesced to actions taken by the trial court, as was the case here when defense counsel affirmatively accepted Gedvilas as a juror, the defendant's only recourse is to present a claim for ineffective assistance of counsel, which, we observe, the defendant has not done so here. See *Bowens*, 407 Ill. App. 3d at 1101, 943 N.E.2d at 1258. Likewise, we reject any notion that Gedvilas' service as a juror constituted structural error requiring automatic reversal of the defendant's conviction, where, as discussed, no error occurred in this case in light of defense counsel's affirmative acquiescence of Gedvilas as a juror. See *id.*; *People v. Averett*, 237 Ill. 2d 1, 12-13, 927 N.E.2d 1191, 1198 (2010) (an error is structural "only if it necessarily renders a criminal trial fundamentally unfair or unreliable in determining guilt or innocence;" structural errors exist in a very limited class of cases). Accordingly, we conclude that the defendant has affirmatively waived review of this claim on appeal.

¶44 We next determine whether the trial court erroneously imposed a 3-year MSR term, rather than a 2-year MSR term, in sentencing the defendant. We review this issue *de novo*. *People v. Johnson*, 2011 IL 111817, ¶ 15 (statutory interpretation is a question of law, which is reviewed *de novo*).

¶45 The defendant, relying on *People v. Pullen*, 192 Ill. 2d 36, 733 N.E.2d 1235 (2000), argues that the trial court erroneously imposed a 3-year MSR term, rather than a 2-year MSR term, because the proper MSR term for a defendant subject to mandatory Class X sentencing is the MSR term

applicable to the underlying felony. He maintains that because his underlying felony conviction for delivery of a controlled substance within 1000 feet of a public park is classified as a Class 1 felony, the appropriate MSR term for a Class 1 felony under the sentencing statute is 2 years. The defendant concedes that this issue was not properly preserved in the trial court, but argues that the sentence is void and may be challenged at any time. Thus, he requests this court to correct the mittimus to reflect a 2-year MSR term.

¶46 The State counters that the defendant was properly sentenced to a 3-year MSR term, arguing that, because an MSR term is an inseparable component of sentencing, the appropriate MSR term was the 3-year term mandated for Class X offenders such as the defendant. Thus, the State argues, because the defendant was sentenced as a Class X offender as a result of his prior felony convictions, he was properly sentenced to the 3-year MSR term.

¶47 Under section 570/470 of the Illinois Controlled Substances Act (Act), a person found guilty of delivery of a controlled substance within 1000 feet of a public park is guilty of a Class 1 felony. 720 ILCS 570/470 (West 2008). Under section 5-5-3(c)(8) of the Unified Code of Corrections (Code), a defendant convicted of a Class 1 or Class 2 felony shall be sentenced as a Class X offender if he is over 21 years old and has, at least twice previously, been convicted of a Class 2 or greater felony. 730 ILCS 5/5-5-3(c)(8) (West 2008). Section 5-8-1(d) of the Code mandates a 3-year MSR term for a Class X felony and a 2-year MSR term for a Class 1 or Class 2 felony. 730 ILCS 5/5-8-1(d)(1),(2) (West 2008).

¶48 In *Pullen*, the defendant entered a negotiated guilty plea for five counts of burglary, which was classified as a Class 2 offense. *Pullen*, 192 Ill. 2d at 38, 733 N.E.2d at 1236. However, as a

result of his prior felony convictions, the defendant was sentenced as a Class X offender. *Id.* at 38-39, 733 N.E.2d at 1236. Pursuant to the plea agreement, the trial court imposed consecutive prison terms totaling 30 years. *Id.* at 39, 733 N.E.2d at 1236-37. On appeal, the defendant argued that the consecutive sentences violated a statute limiting the aggregate length of consecutive sentences to "the sum of the maximum terms authorized under [s]ection 5-8-2 for the [two] most serious felonies involved." *Id.* at 42, 733 N.E.2d at 1238. The defendant argued that the two most serious felonies he committed were Class 2 felonies, which carried a maximum term of 14 years, and, thus, the aggregate sentence imposed could not exceed 28 years. *Id.* at 40, 733 N.E.2d at 1237. The State, however, argued that because the defendant was sentenced as a Class X offender, his offenses should be treated as Class X felonies for the purposes of determining the maximum permissible aggregate sentence, and thus, the aggregate sentence allowable was 120 years. *Id.* at 43, 733 N.E.2d at 1239. The *Pullen* court agreed with the defendant, finding that a "defendant who commits a Class 1 or Class 2 felony, even though he is subject to sentencing as a Class X offender pursuant to section 5-5-3(c)(8), still has only committed a Class 1 or Class 2 felony." *Id.* The *Pullen* court reasoned that because the two most serious crimes committed by the defendant were Class 2 felonies, which was each subject to a maximum sentence of 14 years, the maximum aggregate sentence allowable was 28 years. *Id.* at 42-43, 733 N.E.2d at 1238. Accordingly, the *Pullen* court held that the defendant's aggregate sentence of 30 years was void because it exceeded the maximum allowable aggregate of 28 years. *Id.*

¶49 In the case at bar, the defendant does not dispute that his prior felony convictions required him to be sentenced as a Class X offender pursuant to section 5-5-3(c)(8) of the Code. He only

contends that, under *Pullen*, his MSR term should be determined by the underlying Class 1 felony, hence, a 2-year MSR term, rather than by his status as a Class X offender for sentencing purposes–which would dictate a 3-year MSR term. See 730 ILCS 5/5-8-1(d)(1),(2) (West 2008).

¶50 We have repeatedly rejected this exact argument in cases containing substantially similar facts to those that now confront us. See *People v. Lee*, 397 Ill. App. 3d 1067, 926 N.E.2d 402 (2010); *People v. McKinney*, 399 Ill. App. 3d 77, 927 N.E.2d 116 (2010); *People v. Holman*, 402 Ill. App. 3d 645, 937 N.E.2d 196 (2010); *People v. Lampley*, 405 Ill. App. 3d 1, 939 N.E.2d 525 (2010). We decline to deviate from the sound holding in those cases, which found the facts of *Pullen* to be distinguishable and held that a recidivist felon, such as the defendant here, is subject to a 3-year MSR term because an MSR term is considered part of the sentence imposed upon the defendant as a Class X offender. See 730 ILCS 5/5-5-3(c)(8); 730 ILCS 5/5-8-1(d)(1), (2) (West 2008). Therefore, we find that the defendant, who was convicted of a Class 1 felony but sentenced as a Class X offender because of his criminal history, was subject to an MSR term of 3 years. Accordingly, the trial court properly imposed a 3-year MSR term under the Code and the defendant's sentence was not void.

¶51 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶52 Affirmed.